WINNIPEG FREE PRESS PAMPHLET No. 51

Protecting Our Birthright

Disallowance or Bill of Rights?

Reprinted from the editorial pages of
WINNIPEG FREE PRESS
WINNIPEG, CANADA
(May 1954)

(Extra copies, if available, 10c each)

1

THE judgment of the Supreme Court of Canada in the Jehovah's Witnesses' case, followed a few weeks ago by the restriction by statute of freedom of worship in the province of Quebec, confronts the people of this country with an important issue. As will be shown, this issue is not new. It has arisen in the past, notably in 1937-1939, but never in a more compelling form.

The issue is this: Does Canadian citizenship guarantee to a man or woman freedom of conscience, of person, of speech, of the printed word? Does Canadian citizenship mean that a person possesses these freedoms, or is it an empty, meaningless term?

If Canadian citizenship does guarantee to every citizen, regardless of where he resides in Canada, these fundamental freedoms — who is responsible for maintaining them if they are attacked by private persons, by corporations or other organizations or by provinces?

* * *

Obviously, since Canadian citizenship is nation-wide, there can be only one guarantor of these freedoms — the Federal Parliament. This being so, what means are available to the Federal Parliament and the Federal Government for this purpose?

To all who have followed the Jehovah's Witnesses' case and the subsequent legislation in Quebec and who recall the Alberta Press Act and the Quebec Padlock Law of the 1930's it will be unnecessary to say that here is no arid, dry-as-dust constitutional controversy. This is an urgent issue and at its heart is a question of supreme importance: Are we a nation? Is there such a thing as Canadian citizenship? Or are there, rather, ten different provincial citizenships? Do Manitoba Canadians possess freedom of worship, while Quebec Canadians lack this freedom? Are we no more than a loosely held together confederation of provinces?

It will be the opinion of an overwhelming majority of Canadians that Canadian citizenship is not a hollow term; that, with all its precious freedoms, Canadian citizenship does exist; and that the responsibility for safeguarding and maintaining it rests squarely and inescapably upon the Federal Parliament and the Federal Government.

* * *

A review of the past proves that there are only three ways in which the Federal Parliament and the Federal Government can discharge this responsibility.

First, and most desirable, the Federal Parliament could incorporate in the preamble to the British North America Act a declaration and affirmation of the four freedoms. In annulling the Alberta Press Act in 1938, Sir Lyman Duff, then Chief Justice of Canada, Mr. Justice Cannon and Mr. Jus-

tice Davis based their judgments on the first paragraph of the preamble of the British North America Act (our constitution) which reads as follows:

"Whereas the provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland ***with a constitution similar in principle to that of the United Kingdom.***" (The italics are ours).

Sir Lyman and his colleagues declared that since Canada was created with a constitution similar to that of the United Kingdom, we possess the freedoms which are imbedded in the common and statute law of the United Kingdom. Sir Lyman found, therefore, that power or jurisdiction with respect to these freedoms is possessed exclusively by the Federal Parliament and that no provincial legislature can legislate with respect to them. Hence the decision nullifying the Alberta Act.

* * *

It will be seen that it would be a simple matter to include in this paragraph of the preamble by way of illustration and definition a brief declaration of the actual freedoms. Once this amendment was made to the British North America Act the defence of Canadian citizenship could safely be left to the courts. Any attempt by a provincial legislature or government to restrict or to lessen these freedoms would be declared ultra vires or beyond the power of the provinces.

Second: the Federal Government can use its power of disallowance to defeat any attack by the provincial legislatures on these freedoms. The Federal power of disallowance is unquestioned and unqualified. The record of disallowance will be reviewed at length in later articles.

Third: The Federal Government, can combine its power of disallowance with its authority, under the Supreme Court Act, to refer provincial legislation to the Supreme Court for adjudication. Thus, the Federal Government, invoking its power of disallowance, could "reserve" a questionable provincial statute and thereby prevent it from coming into effect.

Having reserved it, a reference to the Supreme Court could follow. In this way, the hardship, expense and the delay which are unavoidable in the normal process of appeal from the lower courts to the Supreme Court would be avoided in cases involving the fundamental freedoms.

The first method — a Bill of Rights inserted in the B.N.A. Act — speaks for itself. The other two — disallownace or a combination of disallowance and reference to the Supreme Court together with a review of the past policy of this newspaper in this regard will be dealt with in later articles.

2

HOW can the Federal Parliament and the Federal Government defend the freedoms essential to Canadian citizenship?

The simple way, as already stated, is by adding a brief Bill of Rights to the preamble of the B.N.A. Act. But apart from this simple and direct way there is the power of disallowance.

The history of this Federal power has an important bearing on the problem of guaranteeing our freedoms. The British North America Act of 1867, our constitution, has four sections dealing with disallowance. Under sections 55, 56 and 57 the British Government possessed power either directly to disallow or through the Governor General to reserve for "the Queen's pleasure" any bill passed by the Parliament of Canada. Disallowance took the form of an order-in-council passed by the British Government.

Such an order annulled the bill. The time limit within which this power could be exercised was two years from the bill's enactment by Parliament. A bill reserved for "the Queen's pleasure" could not have any force unless the Governor General was able to report within two years that the Queen-in-council had assented to it. The Queen-in-council, of course, meant the British Cabinet.

* * *

Section 90 of the B.N.A. Act vests in the Canadian Governor-in-council—that is the Federal Cabinet — precisely the same power with regard to provincial bills as the British Government held with respect to Federal bills, with the exception that the time limit is one year instead of two years.

That is, the Federal Cabinet, within one year of the enactment of any bill by a provincial legislature, may disallow or annul it by order-in-council; or the Federal Cabinet may instruct the Lieutenant Governor of any province to reserve for "the Queen's pleasure" any bill that may be enacted.

The Lieutenant Governor, by the terms of his appointment is bound to carry out these instructions. If the Federal Cabinet reserves a provincial bill it cannot come into force until such assent is forthcoming. To reserve a bill and to withhold assent, therefore, destroys the bill.

Before tracing the history of the use of disallowance by the Federal Government a word on the constitutional developments in this field will be in order. The British Government used the power of disallowance or reservation only once — in the 1870's. Thereafter the power fell into disuse and gradually, without any change in the law, withered away. The Imperial conference of 1926 noted this fact and declared that the Imperial power of disallowance and of reservation was at an end. In 1930, when the Statute of Westminster was drawn, no direct reference to disal-

lowance and reservation was made therein.

However, the Statute of Westminster provided that in all matters relating to Canada (and the other autonomous Dominions) the Crown would act only on the advice of its Canadian advisers. Thus, after 1930, the only way these Imperial powers could be used was if the Canadian Cabinet advised the Crown to disallow or to reserve its own statute.

To this there was one curious exception that is noted in a resolution passed by the Imperial Conference of 1930 but not in the Statute of Westminster. The Bennett Government desired Canadian securities to continue to qualify under the law of the United Kingdom as trust securities. The United Kingdom Government would only agree on condition that the Canadian Government would consent to the British Cabinet retaining power to disallow any Canadian statute which, in its view, was unfair to the United Kingdom holders of such Canadian securities. To this extent the Imperial power still exists, but, of course, it is a power which exists only by consent of the Canadian Government.

In 1942, the Canadian Government ceased, officially, to notify the British Government of the bills passed by our Parliament at Ottawa.

In contrast with this record of British disallowance, the right of the Dominion Government at Ottawa to disallow or to reserve the legislation of any provincial legislature is just as real and potent today as in 1867 when the B.N.A. Act was enacted. Down the years, the power has been exercised more than 100 times. On numerous occasions, one or other of the provincial governments has protested against the use of this power by the Dominion Government. But such protests have been without effect. Time and again, the Federal power of disallowance or of reservation has been submitted to the courts. Invariably, the courts have found that the Federal Government's power is unqualified and absolute. In 1922, to illustrate, the Privy Council said of this power: "It is indisputable that in point of law the authority is unrestricted." The last occasion when the courts dealt with this power was in 1938. There was then a specific reference to the Supreme Court of Canada -- eight years after the Statute of Westminster. The Court was asked to answer Yes or No to four questions. These questions shorn of legal terminology, were simply "Has the Federal Cabinet the power to disallow or to reserve any or all bills passed by a provincial legislature"

* * *

The answer was a unanimous "Yes."

The reason why the British Government's power to disallow or to reserve Federal legislation has died while the Federal Government's power to disallow or to reserve provincial legislation is still in full vigor and effect is import-

ant to this problem of preserving our freedoms.

The British power over the Federal Parliament is gone because Canada is now a sovereign state. The Federal power over the provinces still lives because the provinces are not sovereign states. And that fact must be reflected in our citizenship unless we are to have ten separate and distinct provincial citizenships or sovereignties. Our constitution declares that we are one nation with a single citizenship, not ten provinces with ten citizenships. And section 90, clothing the Federal Cabinet with the power of disallowance over provincial legislation, is the means of guaranteeing that this single nation will endure.

3

THE history of disallowance by the Federal Government of provincial legislation falls, naturally, into three periods: 1867 to 1898; 1899 to 1911; 1912 until the present time. The power was used more freely in the first than in the second and third periods. In all, 105 provincial bills have been disallowed or reserved and not assented to. Of these, 72 were before the turn of the century.

In the early years, the Federal Government used the power freely because the provinces in many ways challenged Federal policy

In the early years, indeed, the Federal Government used the power to set aside any provincial bill it did not like. There have been innumerable reports by Federal Ministers of Justice on the use of the power of disallowance beginning with the report made in 1868 by Sir John A. Macdonald and ending with that of Rt. Hon. Ernest Lapointe in 1938.

For a time the indiscriminate use of the power did not evoke opposition. This probably was due to the fact that the right of the central Government to disallow or to reserve the legislation of the colonies had always been conceded in the British Empire. The Government of the United Kingdom had used it freely in all the colonies.

* * *

The colony of Canada had grown up under it. The Fathers of Confederation, including all the defenders of provincial rights — men like George Brown and later provincial leaders like Oliver Mowat — not only accepted this situation. At the outset they were advocates of Federal disallowance.

As conflicts between the provinces and the Federal Government multiplied, this attitude changed. A convenient date here is the Mercier provincial conference of 1887, held at Quebec City which demanded the abolition of Federal disallowance and reservation.

At about the same time a marked change took place in

the attitude of the Privy Council towards the provinces. Here, Lord Watson's judgments are of particular importance. The Privy Council under Lord Watson emphasized the "independence" of the provinces.

Following the Mercier conference, Edward Blake, former Liberal leader and one of the foremost constitutional authorities of the day, moved a resolution in 1890 in the House of Commons to the effect that before disallowing provincial legislation, the Federal Government should refer it "for a hearing and consideration" to the Supreme Court of Canada in order that "a reasoned opinion may be obtained for the information of the executive."

It is to be noted that Blake did not propose the reference to the Supreme Court as a substitute for disallowance.

Blake's motion came the year after the very bitter controversy in Parliament on the Jesuits Estates Bill — which turned on the question of disallowance.

* * *

Sir John A. Macdonald, the Prime Minister, ignored the Mercier conference, refused to disallow the Quebec legislation on the Jesuit Estates, but accepted Blake's motion. The Supreme Court Act was duly amended and ever since the Federal Government, if it so chooses, may refer any provincial bill to it for "a reasoned opinion."

With the election of the Liberal Party in 1896, the "provincial righters" took over at Ottawa. The men now in power were largely the men who, as provincial Premiers and Ministers, had been resisting the Federal power of disallowance. The power continued to be used, but more sparingly. The low mark in its use came in 1909. Sir Allen Aylesworth was the Minister of Justice. The occasion was a bill passed by the Ontario Legislature dealing with mining and which, in Sir Allen's judgment, would certainly have been disallowed prior to 1896. Sir Allen defined the policy which the Laurier Government believed should govern the use of disallowance as follows:

"I am willing to go thus far," said Sir Allen, "in the enunciation of the views I am stating to this House, that a provincial legislature, having, as is given to it by the terms of the British North America Act, full and absolute control over property and civil rights within the province, might if it saw fit to do so, repeal Magna Carta itself."

This policy, however, failed. Before two years had passed Sir Allen was compelled by circumstances to recommend disallowance and the Laurier Government acted upon his advice. More, Sir Wilfrid himself, acting for his Minister of Justice recommended in January 1911 that three Saskatchewan bills be disallowed. They were disallowed.

The Borden Government, while professing to dislike the use of disallowance, was also compelled, by circumstances, to use it.

The King Government which prided itself upon its

good relations with the provinces, had scarcely been in office two years before the power of disallowance was used on the advice of Sir Lomer Gouin, the Minister of Justice. Repeated use was made of the power throughout the 1920's when the Liberals were in office.

* * *

The Conservative Administration of R. B. Bennett in 1930-35 never had occasion to use the power. But the Conservative Government upheld it. Hon. Hugh Guthrie, Minister of Justice in the Bennett Cabinet, made an address to the Canadian Bar association upholding and justifying the Federal power of disallowance. When the Liberals returned to power in 1935, they were compelled by circumstances to use this power. The five Social Credit bills enacted by the Alberta Legislature in 1937 were disallowed on the recommendation of Rt. Hon. Ernest Lapointe, the Minister of Justice.

The point is this:

For thirty years after Confederation very frequent use was made by the Federal Government of its constitutional power to disallow provincial bills. Then came a period of 13 years when the power was largely disowned by the Federal Government and very sparingly used. Following 1911, the power was used more frequently but in conformity with conventions and practices slowly built up.

There came to be a narrow but very clearly defined field in which the power of disallowance not only could be but, if this country was to be one nation, must be used.

4

DISCUSSING the history of disallowance, Mr. J. W. Dafoe, writing in 1939, expressed this opinion:

"The power of disallowance of provincial legislation, given to the Governor-in-Council, was regarded by the Fathers of Confederation, as their published statements make clear, as essential to the system of Federation which was designed by them to meet Canadian conditions. This power of applying intervention was left unlimited . . In the 72 years of Confederation, the use of this power has undergone a wide range of experimentation . . . The provinces in the exercise of their powers are rightly free from control or supervision on grounds of Dominion conceptions of policy or procedure or morality — on these general counts there is no assurance that the Dominion is wiser than the province. The Federal Government becomes charged with the authority and the duty to intervene when an application of power by the province either wittingly or by accident nullifies for the residents of the province rights which they possess by virtue of their Dominion citizenship and

which it is necessary that they should exercise if the Dominion is to continue as a free democratic nation. This cannot be justly regarded as the imposition of an authority by a superior power upon an inferior. It is, instead, the preservation of the original division of powers, rights and responsibilities vested in the individual in his dual citizenship by the employment of a constitutional expedient which was created for this very purpose."

The rules governing the use of the power of disallowance gradually built up over the years are to be found in the advice given by successive Ministers of Justice to the Federal Government from 1911 to the present day. Mr. Dafoe was of the view that the germ of the final policy is to be found in the speech of Sir John Thompson, then Minister of Justice, later Prime Minister, in the debate on the Jesuit Estates Bill in 1889.

Sir John said: "The provinces have a liberty to error which must be respected so long as the legal power is not exceeded and the error is not manifestly subversive legally or morally of the principles of the constitution or of the great objects of the state."

Laurier, speaking in January 1911, declared that the Federal power of disallowance was not dead, notwithstanding the views expressed by his Minister of Justice, Sir Allen Aylesworth, two years previously.

* * *

Hon. C. J. Doherty, the Minister of Justice in the Borden Government, did likewise in 1912 (twice), in 1917 and again in 1918. On the latter occasion, the Attorney General of British Columbia protested that provincial rights were being interfered with.

On behalf of the Federal Government, Mr. Doherty replied:

"Upon the submission of the Attorney General that disallowance would involve a serious interference with provincial rights, the undersigned observes that provincial rights are conferred and limited by the British North America Act, and while the Provinces have the right to legislate upon the subjects committed to their legislative authority, the power to disallow any such legislation is conferred by the same constitutional instrument upon the Governor-General-in-Council, and incident to the power is the duty to execute it in proper cases. This power and the corresponding duty, are conferred for the benefit of the Provinces as well as for that of the Dominion at large."

Mr. Doherty's opinion is quoted at length because it became the definitive Federal policy. Sir Lomer Gouin, Minister of Justice in the King Government, restated it in 1922.

Rt. Hon. Ernest Lapointe, Minister of Justice in 1924, recommended the disallowance of an Alberta bill. In doing so, Mr. Lapointe took care to make it clear that the Federal power is not restricted to bills which are ultra vires of the provinces.

He said:

"It is maintained on behalf of the province that the legislation, if intra vires, ought not to be reviewed on its merits by Your Excellency because it is enacted by the Provincial Legislature which is sovereign and independent within the scope of its powers; and if ultra vires, that the statute ought not to be disallowed upon that ground because it is then inoperative and may be so declared by the Courts in appropriate judicial proceedings. If, however, effect be given to these submissions of the province, no place is left for the operation of the power of disallowance which is, in express language, conferred by sections 56 and 90 of the British North America Act, 1867.

"That the power exists is not questioned and it may operate with regard to any provincial statute 'if', in the words of the two sections last mentioned, 'the Governor-General-in-Council within one year after the receipt thereof by the Governor General thinks fit to disallow the Act'. While the discretion thus belonging to Your Excellency-in-Council ought to be wisely exercised upon sound principles of public policy, and having due regard to local powers of self-government, there are cases in which disallowance affords a constitutional remedy, and it is implicit that the exercise of the power ought not to be withheld when the public interest requires that it should become effective . . ."

Speaking to the Canadian Bar Association in 1933, Hon. Hugh Guthrie, Minister of Justice in the Bennett Government, said this:

"We have, as you know, in the Federal Government the power of disallowance of Provincial acts. On a good many occasions during the three years of my term of office, applications have come from various organizations, and in some instances from leading members of the profession, asking that various acts be disallowed as being ultra vires of the legislative authority of the various Provinces. At the present moment several such applications are pending. My only object in mentioning the matter is to announce that the policy of the Department of Justice for some years has been not to disallow an act of a Provincial Legislature unless there is a special reason for so doing. A very able Deputy Minister of Justice, subsequently a Judge of the Supreme Court of Canada, Mr. Justice Newcombe, enunciated a policy in this regard which has since been followed, and, I fancy, will be followed in the future.

"The policy is briefly this, that the power of disallowance will not be exercised except in specific cases: (1) Where the legislation of the Province seriously interferes with Dominion policies or interests; or (2) Where the legislation is unjustifiable as being opposed to principles of good legislation, or as being disadvantageous to the Dominion as a whole. These constitute the only grounds for disallowance of a Provincial act."

Finally in 1937 the King Government on the recom-

mendation of Mr. Lapointe disallowed the Alberta Social Credit bills and when the Alberta Legislature re-enacted them, promptly reserved them for the consideration of the Supreme Court of Canada. The Court nullified all of them.

That brings the record up to date.

It is clear that the Federal Government, while never acknowledging any limitation upon its power of disallowance, has used it over the past 43 years to safeguard and preserve our fundamental rights — those rights of citizenship necessary for the right functioning of the Canadian nation.

5

THE belief that it is the inescapable responsibility of the Federal Parliament to maintain throughout this country, regardless of provincial boundaries, the essential freedoms without which Canadian citizenship is meaningless, is not new. This belief is widely held. It was argued with great force and clarity before the Sirois Royal Commission. One of the most scholarly and impressive briefs submitted to the Commission was written in collaboration, by Mr. J. B. Coyne, now a member of the Manitoba Court of Appeal, Dr. A. R. M. Lower, the historian, and Dr. R. O. McFarlane, then Assistant Professor of History at Manitoba University and now Dean of the Faculty of Government at Carleton College, Ottawa.

* * *

This proposition was consistently and vigorously supported by this newspaper, under the editorship of the late J. W. Dafoe.

It may be asked, why did the Sirois Report not adopt the proposal? The short answer is that Dr. Dafoe, a member of the Commission, was unable to carry his colleagues with him. It is permissible to say that Dr. Dafoe prepared a memorandum, captioned "Rights of Citizenship," setting out what he believed the Sirois Commission ought to say. Extracts from this memorandum will be included in a later article. Finally, leading constitutional historians like Professor McGregor Dawson of Toronto University have supported this proposal. His views are given at length in his book "The Government of Canada."

A brief review of the record of the Free Press will be of value because it demonstrates that so long as the Federal Parliament does not guarantee the basic liberties of Canadian citizens — freedom of worship, of person, of speech, of assembly and of the press — the danger is many sided. In the later 1930's the peril came in Quebec from Mr. Duplessis' Padlock Law and in Alberta from the Social Credit Government's legislation on the press. Today the danger is again in Quebec where Freedom of Worship is

being curtailed and one religious sect has been persecuted by the Duplessis Government.

The quotations from the Free Press deal with broad policy in terms of the Padlock Law and the Social Credit legislation.

The Free Press leading editorial of April 1, 1937 said:

"In Quebec it is freedom of thought and speech to which the province is hostile. In another province it might be freedom of trade which would be regarded as the enemy. To the destruction of this freedom the Duplessis device could be as readily directed as it is in Quebec to the curbing of opinion. What, for instance, is to prevent the province from providing by legislation that any store stocking commodities of some class which it chooses to prohibit, shall be padlocked for twelve months?

"The Duplessis dodge is the negation of the whole principle of Confederation. If it is constitutionally permissible it has only to be applied generally to blow up the Dominion of Canada. This being so this question might be fairly asked: What is the duty of the Federal Government in a case like this? Does it owe anything or does it not to Dominion citizens living in provinces which lay usurping, violent hands upon rights which are theirs by virtue of that citizenship? If the answer is in the negative, what then?"

* * *

On August 18, 1937, the Free Press returned to the point, as follows:

"In the consideration of the matter of disallowance and the circumstances under which it may properly be exercised by the Federal authority, one aspect of the case to which very little attention has as yet been directed must be borne in mind. This is the question of the obligation which rests upon the Dominion Government when this issue comes up. There seems to be a very general idea that these are questions to be decided solely on grounds of strategy, of political tactics. If there are political, that is to say party, reasons why the Dominion Government — which is always a party organization as well as being the supreme governing power of the country — should ignore provincial actions detrimental to wider interests, it is held, apparently by many, that the Government is under no responsibility in the matter. It can ignore, at will, the difficulty and its consequences without thereby laying itself open to responsibilities which rest upon the Dominion Government to examine carefully all provincial legislation; and the obligation is upon it to see that, where this legislation infringes upon the Dominion rights of a citizen of the offending province, it does not become operative by whatever means are available to that end.

"Disallowance is the ultimate resort in a case of this kind, but for the past forty years it has only been resorted to on occasions when settlement by alternative and milder courses proved impracticable. As the record shows, there has been a resort to this

power at not infrequent intervals; it is inaccurate to say that the practice of disallowance has been abandoned and a policy adopted of always leaving matters in dispute to the courts."

Again: "It will be conducive to clear thinking on this important question if it is borne in mind that the Dominion Government cannot be neutral and indifferent if it is to discharge its constitutional duty of passing upon provincial legislation which affects Federal interests. It exercises a responsibility if it accepts such laws just as it does if it decides that they call for inquiry and decision. The Dominion Government, in reviewing the recent Aberhart legislation, was not in the least interfering in a sphere where it has no rights; and in exercising its power of disallowance it was attending to its own business in the field of authority in which it is placed by the laws of the Dominion. It was discharging its inescapable duty as the defender of the Federal structure, the protector of the Dominion Rights of the citizens of Alberta.

* * *

"Because a man lives in Alberta he is not subject in all his capacities to the whims and the tyrannies and the lunacies of an unbalanced provincial legislature. His rights as a Dominion citizen are beyond them. Any attempt to deprive him of them is a usurpation against which he has a right to look for protection to all the people of Canada from Vancouver Island to Cape Breton; and it is their duty to defend him by the exercise of whatever p o w e r is necessary to achieve this end."

6

RETURNING to the question of the inescapable duty of the Federal Parliament to protect the basic rights of Canadian citizens, the Free Press in October 28, 1937, defined the conventions or rules which should govern the exercise by the Federal authority of the power of disallowing or nullifying provincial statutes.

The Free Press said:

"These conventions must rest upon the definite principle that a province must not, by a misuse of its powers, destroy or hamper policies entered upon in the general interest of the whole Dominion, and it must not, by employing powers of control or punishment given to it for purely provincial purposes, coerce Canadians resident in the province into foregoing their privileges and their rights as Canadian citizens. A disposition to usurpations of this sort has been noticeable in various parts of the country in recent years and in Alberta it has been turned into an open policy of defiance of the central authority which takes the form of limiting or destroying within the province, rights which the individual holds because he is a citizen of Canada. Wherever a case of this kind emerges the Dominion Government is

under an obligation to protect the rights of its citizens by all the means at its disposal, including the use of disallowance should this be found necessary."

Again, and this time clearly suggesting a Bill of Rights:

"There are other rights, not explicitly affirmed in the constitution because no one ever thought this necessary. They are implied in Canadian citizenship by virtue of the growth of individual liberty down the centuries, by our traditions and by our history. Our American cousins, leaving nothing to chance, have imbedded these rights in the texts of their constitutions, federal and state. They are set out in the Bill of Rights which was added to the United States constitution in the form of the first nine amendments. They include the free exercise of religion; freedom of speech; freedom of the press; the right of the people peaceably to assemble · all fundamental human rights the denial of which is the negation of liberty. These rights go with Canadian citizenship and if our constitution is ever reconstructed it is to be hoped that they will be embodied in articles, irrepealable and unchangeable. Meanwhile, the Dominion Government will make no mistake if it affirms that it considers these rights beyond the power of any province to challenge or impair and declares that it will employ all the power at its disposal, including that of disallowance, in their defence. Such a declaration would be warmly approved by an overwhelming majority of the people of every Canadian province; and it would be recognized everywhere as a convention which would determine the course of the Dominion when a need for action should arise."

The Free Press on November 27, 1937, discussed the question with particular emphasis on the Padlock Law and the Alberta Press Act, then before the Supreme Court of Canada: "This freedom (freedom of the press) is threatened in two provinces and it is no argument for Mr. Duplessis that what Quebec does is not the business of the rest of Canada Quebec people are citizens of Canada. Their civil liberties are liberties they enjoy—or lose—as Canadians. They do not form a state within a state, but an integral part of the Dominion. What happens to freedom in Quebec is the concern of people in every one of the other eight provinces."

On December 22, 1937, the Free Press said: "More than once in recent months, the Free Press has had occasion to point out that the existence of Confederation brings with it duties, privileges and responsibilities of Canadian citizenship. Among these is surely the continued existence of those civil liberties upon which the practise of democracy depends. When these are threatened it becomes a proper function of the Dominion Government to re-establish them, and it seems to us a reasonable and moderate use of the Dominion power of disallowance to sweep the Padlock Law and all other laws

with similar implications, off the statute books, where they have no right to be."

Again on February 8, 1938 the Free Press said this: "Citizenship in the Dominion would be robbed of all its meaning and value if provincial laws could be enforced denying freedom of discussion . . . . .Restrictions upon fredom of discussion, once successfully asserted, could be extended to any length. All the provinces could do what Quebec is doing, and if they all passed Padlock Laws, the way would be opened to the speedy overthrow of democracy and the establishment of a dictatorship. Whatever rights the people of Quebec have as provincial citizens, their rights as citizens of the Dominion cannot be denied or limited . . . In the determination to suppress opinions which the Government of Quebec and others in that province regard as dangerous, there has been a clear invasion of the rights which all citizens should enjoy without question. If one province can do this, others can do it also."

The Free Press, July 8, 1938: "There is a large and growing body of opinion in Canada that intends to see that the Federal power becomes the buckler and shield of fundamental human rights in every part of Canada."

The Free Press on June 8, 1939:

"Two practical methods are available for the Dominion in any attempt to provide Canadian citizens with equal rights and privileges—to say nothing of responsibilities—from coast to coast. One of these would be by the process of constitutional amendment, "A Bill of Rights," making it abundantly clear that the Dominion's jurisdiction in all matters pertaining to civil and political liberty was unquestioned. The other method is by wise, prudent but vigorous and fearless use of the powers of disallowance conferred upon it under the British North America Act. That power the Government refused to use in the case of the Padlock Law. All that remains for it to do at this moment and in the test case (the Padlock Law was then under appeal in the courts of Quebec) is to throw itself into the legal battle now pending and present the case for Dominion jurisdiction with all the resources and ability at its command."

The Free Press August 15, 1939:

"If the constitutionality of the Padlock Law is upheld, the way is opened for the passage of restrictive acts in all the nine provinces which can make any mortal thing illegal within their boundaries. Political parties, religions, organizations of all kinds, on the flimsiest kind of pretext, can be ruled illegal. By the simple method of asserting the provincial right over property, houses used for anything from eating to divine worship, can be padlocked. Discussion of anything from politics to art can be stopped . . . .It should be pointed out again that Canadians, who are real Canadians, want to see the authority of the Dominion established. . . . . ."

7

THE purpose of this concluding article is to show that the peril to the freedom which is our birthright, is not theoretical or imaginary but real and urgent. The freedom without which citizenship is a mockery has been attacked by provincial legislatures three times in recent years.

In 1937, freedom of the press was attacked by the Social Credit majority in the Alberta Legislature. At the outset the attack was defeated by the Federal Government. The Social Credit statutes were disallowed. Premier Aberhart promptly summoned a special session of the Alberta Legislature and re-enacted them. Thereupon the Federal Government reserved the bills and submitted them to the Supreme Court of Canada.

The Supreme Court declared them ultra vires on the ground that no provincial statute could frustrate rights possessed by the people as citizens of Canada. It is unnecessary to quote from this judgment as it has already been dealt with.

* * *

The essential freedom of Canadians was assailed in Quebec in 1937 in the notorious Padlock Law. This law has been dealt with in these articles. Unfortunately the Federal Government in 1937-38 refused either to disallow or to reserve this bill. It ignored the advice of many newspapers, organizations and individuals that the Padlock Law should be treated precisely as the Alberta Press Act — disallowed or referred to the Supreme Court.

But for reasons never disclosed, the King Government was not prepared to join battle with the Duplessis Government. When urged to do so in the House of Commons, Rt. Hon. Ernest Lapointe gave lame excuses and unconvincing reasons why the Padlock Law and the Alberta Press Act were dissimilar. The Padlock Law, while it got into the Quebec Courts, never reached the Supreme Court of Canada and therefore was never passed upon. It remains on the statute books of Quebec, an ever present menace to freedom. But the Quebec Government has not sought to enforce it since 1939. One quotation from this Padlock Law will indicate the extent to which it violates the fundamental rights of citizenship:

Section four reads:

"The Attorney General . . . . may order the closing of the house against its use for any purpose whatsoever for a period of not more than one year; the closing order shall be registered at the registry office of the registration division, wherein is situated such house, upon production of a copy of such order certified by the Attorney General."

That is to say, houses or offices may be padlocked at the whim of a politician or a Government. The courts of law have nothing to say. No trial precedes the action and no proof, in the proper sense of the word, is required. Further, the Attorney General—

a politician, not a judge — is given absolute and unchallengeable power to confiscate any document found in a padlocked building (section 14).

Notwithstanding that a dozen years have passed since the Padlock Law was invoked, it lies like a bomb under the freedom of Canadian citizens.

Finally and within the past few months there has been the Jehovah Witnesses case and the amendment to the Quebec Freedom of Worship Act at the last session of the Legislature of that Province. Both have been dealt with in detail in earlier articles.

Had the majority of the Supreme Court followed the precedent of the Alberta Press Act and found against the Quebec City by-law under which the Jehovah Witnesses were prosecuted — on the ground that the preamble to the British North America Act guarantees the basic freedoms to all Canadian citizens — had this occurred, the peril would have been greatly lessened.

The preamble to the B.N.A. Act, it might have been said, had really become our Bill of Rights. But in The Jehovah Witnesses Appeal, only four judges of the Supreme Court followed the Duff judgment. Four others found that the Quebec City by-law was within the power of the Quebec Legislature to enact. The ninth and decisive judgment by Mr. Justice Kerwin found that the Quebec Legislature was fully competent but that an earlier provincial statute passed in the 1880's guaranteed freedom of religion.

It is true, therefore, that while the Jehovah Witnesses won the case, no comfort can be drawn from it by those who believe that the fundamental freedoms are inherent in Canadian citizenship. In effect, the Supreme Court in the Jehovah Witnesses case reversed the judgment of Sir Lyman Duff in the Alberta Press Act case.

* * *

The Duplessis Government was quick to avail itself of the loophole provided by the majority decision in the Jehovah Witnesses' case. The old Quebec Freedom of Worship Act was promptly amended and as a result of this amendment there is now no freedom of worship, speech, or publication in Quebec.

So far there have been no prosecutions under the new Quebec Freedom of Worship Act so that no judicial decisions upon it are available.

As with the Padlock Law, the most arresting and inexplicable feature of the litigation over the Jehovah Witnesses and of the new Freedom of Worship Act, is the torpor of the St. Laurent Government. The St. Laurent Government has not raised a finger to protect the rights of Canadian citizens in Quebec either by disallowance or reservation and reference to the Supreme Court.

Nor did the St. Laurent Government intervene at any stage of the prosecution of the Jehovah Witnesses to defend Canadian citizens against persecution inflicted because of their religious belief or of the right to distribute printed matter in Quebec.

SUMMING UP

Is there such a thing as Canadian citizenship?

If so, and the Free Press ardently affirms that there is, this citizenship must guarantee freedom of worship, of speech, of person and of publication to all who possess it, whether they happen to reside in Quebec, Manitoba, British Columbia or Newfoundland. Over the past years, and particularly within the past year, Canadian citizenship has been gravely imperilled by provincial prosecutions and statutes challenging these freedoms. Today the challenge to Canadian citizenship comes from Quebec. Yesterday it came from Alberta. But the province of origin is of small matter. Of pre-eminent importance is that attacks, from whatever quarter and regardless of political sponsorship, should be repelled.

* * *

Who is to defend Canadian citizenship?

Who is to prevent us from becoming a heterogeneous, loosely associated group of 10 provinces, each with its own brand of citizenship, some free, some half free, some unfree?

In a brief submitted to the Rowell-Sirois Royal Commission in 1937, J. B. Coyne, A. R. M. Lower and R. O. MacFarlane put the case perhaps in extreme form but in a way that will grip the mind of the public.

> "If the inconceivable did happen", they wrote, "and a province attempted to revive slavery under its control of property and civil rights, would that infringe our constitution? Would it be a matter for disallowance or non-assent, on the part of the Dominion? If so, why? A certain minimum of civil rights must belong to Canadian citizenship and, if not implicit in our constitution, the Dominion must properly be the guardian of that minimum. The Dominion would not be able to 'endure half slave and half free,' with free citizens in one province and in another half citizens, or citizens as to Section 91 (of the BNA act) but slaves as to section 92."

Subsequent to this brief, the Supreme Court of Canada, in the Alberta Press Act case, found that this "minimum of civil right" is implicit in the preamble to our Constitution,

the B.N.A. Act. But this judgment of 1938 has been placed in hazard by the later judgment in the Jehovah Witnesses case on October 6, 1953.

* * *

There can be only one guarantor of freedom of worship, of speech, of person and of publication. That guarantor must be the Parliament of Canada and its servant the Federal Government. And the means whereby Parliament can achieve this end is ready to its hand. There are three practical courses open to Parliament.

1. Strengthen the preamble to the British North America Act, along the lines of Sir Lyman Duff's judgment of 1938, leaving no doubt that the freedom of a Canadian citizen is beyond the reach of a provincial legislature. Such an amendment, which would be the equivalent of a Canadian Bill of Rights, would be self-enforcing. The courts would enforce the law and in doing so would nullify attacks on freedom.

2. Instruct the Federal Government to stifle all attacks on freedom by provincial legislation either by disallowing such bills or by reserving and referring them to the Supreme Court of Canada.

3. See to it that the Federal Minister of Justice, as in the Alberta Press Act case, instructs his law officers to enter the courts in defence of the basic freedom of any and every citizen of Canada, regardless of which province he happens to reside in.

This is the issue which was raised in the late 1930's by the Alberta and Quebec Legislatures and which has been raised anew in the Province of Quebec.